IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application under and in terms of Article 11, 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Case no.SC/FR/97/2017

1. Hewa Maddumage Karunapala
2. Pallekkamkanamge Dona Kumudini
3. Child Petitioner (as he is a minor his name has been withheld)

PETITIONER

VS.

1. Jayantha Prema Kumara Siriwardhana,
   Teacher,
   Puhulwella Central College

2. M. Leelawathie,
   Puhulwella Central College,
   Puhulwella

3. W.R. Weerakoon,
   Zonal Director of Education,
   Zonal Education Office,
   Hakmana

4. Sunil Hettiarachchi,
Secretary,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla

4A. Prof Kapila Perera,
Secretary,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla

5. Hon. Akila Viraj Kariyawasam, MP,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla.

5A. Prof.G.L.Pieris,
Hon. Minister of Education,
Isurupaya, Pelawatta,
Battaramulla.

6. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE : **SISIRA J. DE ABREW, J.**
MURDU N. B. FERNANDO, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Thishya Weragoda with Sanjaya Marambe, Sewwandi Marambe, Meinusha Gamage and Sashya Karunokalage for the Petitioners.

Harishke Samaranayake instructed by Namal Premardana for 1st and 2nd Respondents.
Ms. Swasha Fernando, SC for 6th Respondent.

ARGUED ON : 17th September 2020.

WRITTEN SUBMISSIONS : 6th Respondent on 10th September 2020.
Petitioners on 10th September 2020.

DECIDED ON : 12th February 2021.

S. THURAIRAJA, PC, J.

The 3rd Petitioner (a minor of 15 years of age at the time of Petition, whose name is withheld, hereinafter referred to as "Child Petitioner"), was a student at Puhulwella Central College. The 1st and 2nd Petitioners are respectively the father and mother of the Child Petitioner.

The 1st Respondent, Jayantha Prema Kumara Siriwardhana (hereinafter referred to as the 1st Respondent), is the Art Teacher, Teacher in Charge of Discipline and Sectional head of Puhulwella College while the 2nd Respondent, M. Leelawathie,

is the Principal of the same school. The 3rd Respondent, 4th Respondent, 5th Respondent are authorities under whose overall guidance and supervision Puhulwella Central College as a public school operated at the time of the incident while the 4A Respondent and 5A Respondent are current office-bearers of the specified positions.

The Petitioners instituted an action at the Supreme Court under Article 126 of the Constitution, through Petition dated 7th March 2017 against the 1st-6th Respondents stating that the Fundamental Rights of the Child Petitioner as guaranteed by Article 11 of the Constitution have been infringed by the Respondents.

The facts

The facts are such that on the 13th February 2017, the 3rd Petitioner attended school as usual. During the 1st and 2nd periods of the day allocated for Agriculture, the Petitioner was made part of one of three groups in the class and was directed to plough a designated area of the school grounds at the plant nursery in order to plant vegetables.

The Petitioner, during the execution of this exercise had felt fatigued and had sat on a half wall near the plant nursery for a short amount of time prior to resuming this activity. One of the classmates of the Child Petitioner had kept the Petitioner company during this time. Thereafter the Child Petitioner had resumed the designated task following this short break.

The Child Petitioner further states that while he was washing his hands and tools, two students had approached him and told him that the 1st Respondent asked him to come to his office. The 1st Respondent also admits to this and adds that on seeing the Child Petitioner seated on the culvert during the previous period, had summoned him and reminded him that the Principal had previously warned them not to sit on that specific culvert as it was dangerous and questioned him as to why he had done so even after the warning.

It is observed from the material submitted to this court that the Child Petitioner states that the 1st Respondent then questioned the Child Petitioner asking:

"කොහෙද උඹ අර වාඩි වෙලා හිටියේ ?"

("Where was it that you were sitting?")

And slapped the Child Petitioner across the face. The Petitioner states that the blow landed on his face, upon his left ear. The Petitioner had felt excruciating pain, severe discomfort, and been startled and disoriented. However, after the incident, the Child Petitioner had been chased out of the classroom by the 1st Respondent.

The Child Petitioner had then been in his class and remained in excruciating pain. When the 1st Respondent was informed of the Child Petitioner's situation, the 1st Respondent came to the Child Petitioner and said:

"ඕක ගණන් ගන්න එපා"

("Don't take it so seriously/ Ignore it")

Thereafter, the Class teacher had been informed that the Child Petitioner wants to speak to her. The Child Petitioner states that when he had told her that the Art teacher had hit him and stated that his ear was hurting and that he wants to go home, the Teacher has responded saying:

"ඕක ඇරිල යයි. ගෙදර ගිහින් එක දෙක කරලා අම්මලාට කියන්න එපා."

("It will pass. Now don't go home and exaggerate it and tell your parents")

The Child Petitioner had returned to his classroom where the 1st Respondent had later returned with another teacher who spoke to the Child Petitioner and said:

"කනෙන් ලේ ආවොත් කියන්න"

("Tell me if it bleeds")

And further offered to get the Child Petitioner tea from the canteen.

It must be noted that no staff member offered any form of medical assistance to the Child Petitioner. As no such assistance was forthcoming and he was not allowed to go home, the Child Petitioner had bought himself 2 Panadol pills as painkillers from the school canteen.

It must further be noted that no staff member proceeded to inform the school Principal of this incident prior to the Principal being informed later in the day by a family member of the Child Petitioner before he was admitted to the hospital.

After the Child Petitioner returned home from school at the end of the school day, he told his grandmother that the Art teacher had slapped him and that his ear was aching. Thereafter the Child Petitioner was taken to the Kirinda-Puhulwella Rural Hospital and his ear had been examined. The Doctor has commented that there is eardrum damage and recommended that the 3rd petitioner be admitted to the Matara General Hospital. In the Medical note issued by the Kirinda-Puhulwella Rural Hospital to the Director of Health, Matara General Hospital, annexed as 'P2', it is stated as follows:

> *"This 15 Year old school boy c/o- L hearing in L/ear following an assault to ear by a teacher.*
>
> *Penetration in ear drum. Please admit for ENT opinion"*

The Child Petitioner was thereafter taken to the Matara General Hospital and admitted. It should be noted that even though the child was suffering from ear pain he was not officially transferred/transported to the General Hospital. The Child Petitioner was taken to Matara General Hospital by the 2nd Petitioner. At the time of arrival of the 2nd and 3rd Petitioners at the Matara General Hospital, the 2nd Respondent and two other teachers of the school were at the hospital awaiting the arrival of the Child Petitioner. The Child Petitioner was thereafter transferred to Karapitiya Teaching Hospital on 14th February 2017 for further investigation and returned to Matara General Hospital on the same day. The Petitioner also states that

a statement was recorded by the Police while the Child Petitioner was at the Matara General Hospital and the Petitioner was thereafter discharged.

The investigative notes are available at 'P3'. As per the note, it appears that it is an internal administrative document maintained by the hospital and not issued to the patient. According to the details available it states as follows:

"Assaulted by teacher to left ear"

A diagram drawn illustrates that there is a small perforation, Send to THK (presumed Teaching Hospital Karapitiya), And it is a rubber stamp of consultant ENT surgeon of Matara hospital placed on the document. It is observed that P3 document is an internal document as it states, "not to be taken away". Further, there is no proper medical report available.

However, as there had been no conclusive treatment, the Child Petitioner continued to be in excruciating pain after returning home. In these circumstances, being unsatisfied with the treatment at the previous hospitals, the 2nd petitioner after discussing with the 1st Petitioner decided to admit the Child Petitioner to the Colombo National Hospital on the 15th of February 2017 for treatment and further investigation. The Child Petitioner was kept overnight for observations and investigations and discharged the following day.

The medical investigations as evidenced by the true copy annexed as 'P4' written by the Doctors of the Colombo National Hospital, demonstrate that the finding was one of a perforated ear drum and that the Child Petitioner was suffering from "*conductive hearing loss*" on the left ear in hearing low frequencies. The Petitioners believe this to have been caused by the assault on the Child Petitioner by the 1st Respondent as the Child Petitioner did not have any history of hearing loss prior to this incident.

The Child Petitioner was admitted on 15th February 2017 and discharged on 16th February 2017. It appears he was examined by Consultant ENT surgeon at the

National Hospital. Further, he was referred to the Department of Audiology and a proper examination was done on the Child Petitioner. The report from the Audiology Department makes the comment that there is normal hearing in the right ear, but that there is Mild Conductive hearing loss only at low frequencies in the left ear. Additionally, a plan of action was given, inclusive of Psychological counselling.

The above documents were submitted together with the FR application dated 30th Aug 2018.

I must note that there is no medical report from the Kirinda-Puhulwella Rural Hospital, Karapitiya Teaching Hospital or the Matara General Hospital, and that unfortunately, the State, even though they had the power and authority to get the reports form the relevant government hospitals, have not endeavored to do so. They have merely made their observations and not made any attempt to assist the court in this regard.

According to the Petitioners when the matter was taken up with the school authorities, they had not taken any interest in this matter.

When leave was granted the Attorney General refused to appear for the 1st and 2nd Respondents. The Attorney at law for the 3rd,4th, 5th and 6th Respondents, tendered his appointment as the Attorney-at-law for the aforementioned parties while submitting the affidavit of the 3rd respondent, The Zonal Director of Education of the Zonal Education Office at Hakmana and further submits the report regarding the preliminary inquiry held under the supervision of the Zonal Director of Education annexed as '3R1'. Paragraph 5 of this report finds that the 1st Respondent has hit the Child Petitioner despite doing so without malicious intent or with intent to cause injury. It further finds that by such act, the 1st Respondent has violated circular no. 14/2016 issued on 29th April 2016 issued by the Secretary of the Ministry of Education. Paragraph 6 establishes that for the stated violation, the 1st Respondent is to be removed from the Disciplinary Board of the school in addition to being advised to never repeat such conduct as assaulting a student in the future.

In regards to the document '3R1', I wish to make two observations. Firstly, I must clarify that the report indicates a factual error in the circular referred to therein. In the final page of the report, it is stated as mentioned above, that the 1st Respondent has violated circular no 14/2016 issued on 29th April 2016 issued by the Secretary of the Ministry of Education. However, for the clarity of reference it must be noted that the circular issued on 29th April 2016 by the Secretary of the Ministry of Education bears the Circular number 12/2016 and not 14/2016, and it is the current circular in operation in relation to matters of discipline of school children.

Secondly, I cannot overlook the contradictions in the statements by the 1st Respondent in the examination of '3R1' and the affidavit of the 1st Respondent. I must note that the report does not include the complete statements of the concerned parties, mentioned in the report as annexures 1 through 8, as the annexures have not been reproduced before this court. However, in the summary of the statements by the 1st Respondent as produced on Page 2 and 3 of the report, it is stated that the 1st Respondent affirms that he had sent 2 students to fetch the Child Petitioner and upon the arrival of the Child Petitioner to his classroom, he proceeded to remind the Child Petitioner that the School Principal had previously advised on the dangerousness of sitting on the specific culvert wall, while hitting the upper portion of the body of the Child Petitioner. He has further stated that the Child Petitioner ducked at the exact time and that the slap had hit the Child Petitioner in the face, but that he is confident that the slap did not land on the Child Petitioner's ear. Additionally, as per the summary of statements by the Head of the disciplinary board of Puhulwella Central college, Mr. P. S. K. H Abhewikrama, he was made aware of the situation during school hours upon being told that the 1st Respondent had brought in a student and hit him. Thereafter, he had spoken to the Child Petitioner and deemed that the injury was not serious enough to refer the matter to the school Principal. The above statements make it evident that there has been assault by the 1st Respondent on the Child Petitioner.

However, I find that the 1st Respondent contradicts his statements in the affidavit dated 9th January 2018. The 1st Respondent states that when he confronted the Child Petitioner in that he did something very risky, the Child Petitioner admitted it. The 1st Respondent provides a narrative whereby he then seems to have quite calmly explained that there were other places where the Child Petitioner can sit down if he felt tired and not on top of the derelict wall and that he further explained that only a disorderly or "rowdy" person would behave in such a manner. He paints a picture in that after having warned the Child Petitioner, he simply tapped the Child Petitioner's shoulder and demanded that he rectify this behavior in the future. Thereafter, the 1st Respondent in his affidavit vehemently denies the fact that he assaulted the Child Petitioner and that for this reason, the statements of the Petitioner's actions are *mala fide* and contrary to law. However, the official report annexed as '3R1' in paragraph 4.1 expressly finds that the 1st Respondent has assaulted the Child Petitioner as per his own statements in that he attempted to slap the Child Petitioner, albeit him stating that it was directed at the upper body and that the Child Petitioner seems to have been at fault for ducking in the last moment. Thus, I am of the view that this benevolent stance introduced in the Respondent's affidavit is in no way supported by the evidence and statements before this court.

Finally, in matter to be noted in the 1st Respondents Affidavit, he states that the Child Petitioner failed to promptly inform the school Principal and the medical center about his alleged complaints and that the Child Petitioner has only done so several hours following his return home.

I am of the view that the statements in his affidavit are not supported at any point in any other document, but rather that all evidence before this court contradicts this stance taken by the 1st Respondent in his affidavit. As the official report annexed as '3R1' in paragraph 4.1 expressly finds that the 1st Respondent has assaulted the Child Petitioner as per his statements, I am inclined to believe and maintain this stance proceeding forward. Additionally, I observe that it is the duty of the 1st Respondent,

Class teacher and any other teacher of the school aware of this situation during school hours, to direct the Child Petitioner to the school Principal and/or the medical center. However, they have acted negligently by downplaying this incident and providing no assistance whatsoever to the Child Petitioner, even after being made aware of the situation.

Based on the above facts, The Petitioner deems the admonishment by the Zonal Director of Education as stated in the document marked '3R1' at Paragraph 6, to be insufficient in relation to the damage caused and submits that assaulting the Child Petitioner by slapping him across the face, causing injuries to the left eardrum of the Child Petitioner, failing and/or neglecting to provide medical attention to the Child Petitioner constitute to violation of the rights of the Child Petitioner protected by Article 11 of the Constitution in that the acts amount to torture, cruel, inhuman degrading treatment or punishment. As such, the Petitioners request for relief under Article 17 of the Constitution, as the alleged violation has occurred by an administrative act by a school teacher in his capacity. For the above reasons, the Petitioners pray for this Court to declare that the Child Petitioner's fundamental Rights have been infringed and grant such relief as the Court may deem just and equitable taking into account the facts and circumstances of the case.

Corporal Punishment

In addressing the instant case, I firstly wish to address the origin of Child protection laws of Sri Lanka.

The protection of children has been of common global interest since the early twentieth century as there were no standards for protection of children in the industrialised countries. It was common practice for them to work alongside adults in unsanitary and unsafe conditions. Growing recognition of the injustice of their situation, propelled by greater understanding of the developmental needs of

children, led to a movement to better protect them. The Human Rights Commission of the United Nations identified the need of a convention for the welfare and protection of children. Thus, the **United Nations Convention on the Rights of the Child (UNCRC)** was prepared jointly by the United Nations Organisation and non-governmental organisations under the patronage and guidance of the Human Rights Commission and was adopted on November 20th, 1989 at the 44th session of the General Assembly of the United Nations. It is considered the most rapidly and widely ratified human rights treaty in history. Sri Lanka signed the Convention on the Rights of the Child on 26th January 1990 and ratified it on 12th July 1991. As a follow-up to the UNCRC, the government of Sri Lanka formulated the Children's Charter in 1992. Thereafter, Sri Lanka has proceeded to sign and ratify multiple convention as well as implement and amend national laws in order to further the cause of protecting the rights of Children, in line with the commitments Sri Lanka has undertaken as signatory to the UNCRC.

Article 28 on the Child's Right to Education states as follows in subsection 2:

> *"States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."*

Article 28 thus recognises the need for children to face disciplinary actions in schools where necessary but allow for no exception to deviate from the standard imposed by the convention in avoiding any form of physical or mental violence towards children. This is supported by Article 19 of the UNCRC which states as follows:

> *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."*

It is not a point of contention that the UNCRC stands strictly against Corporal Punishment. By the early 21st century, more than 100 countries had banned the Corporal Punishment of children in school. In 2006, **the Committee on the Rights of the Child issued in its 42nd Session, "General Comment No.8 (2006)"**, focused on the right of the child to protection from Corporal Punishment and other cruel or degrading forms of punishment. This Commentary largely focused on Article 19, 28(2) and 37 of the UNCRC. **Paragraph 11** of **Comment no. 8** describes Corporal Punishment as follows:

> *"any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, Corporal Punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."*

Based on the above it is clear that the UNCRC cannot be interpreted as supportive of Corporal Punishment of any form. However, it must be recognised that rejection of Corporal Punishment is not a rejection of the concept of discipline. It must be understood that the healthy development of a child depends on parents and adults providing the necessary guidance, in line with the child's evolving capacities in order to assist their growth towards responsible life in society. An individual's understanding of discipline, respect for rules, a healthy attitude towards a non-violent

society are integral attributes that must be instilled from a young age. However, in civilized society, these goals are to be accomplished using alternative forms of discipline which do not inflict physical or mental harm.

Sri Lanka as a signatory to the UNCRC has understood the need to curb the widespread use and acceptance of Corporal Punishment. This evolution in mindset can be viewed through the development of laws through the enactment of amendments to existing laws, circulars exhibiting the attitude of the Ministry of Education as well as the changing attitude expressed in Judgements, in regards to Corporal Punishment.

The Penal Code in discussing Criminal force has stated in Section 341 that any person who intentionally uses force on any person without the consent of the other person, *"in order to the committing of any offence, or intending illegally by the use of such force to cause, or knowing it to be likely that by the use of such force he will illegally case injury, fear, or annoyance to the person to whom the force is used, is said to use "criminal force" to that other."* In regards to Corporal Punishment, I must bring to light Illustration (i) which illustrates as follows:

> *"A, a schoolmaster, in the reasonable exercise of his discretion as master, flogs B, one of his scholars. A does not use criminal force to B, because, although A intends to cause fear and annoyance to B, he does not use force illegally".*

While the above provision and illustration have not yet been repealed, the current approach considers the above to be archaic. Upon ratification of the UNCRC the need to make relevant changes to the Penal Code was understood and led to the **Penal Code (Amendment) Act, No.22 of 1995.** The Amendment inserted a Section operative as Section 308A of the principle enactment as follows:

> *(1) Whoever, having the custody, charge or care of any person under eighteen years of age, willfully assaults, ill-treats, neglects, or abandons such person*

or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned in a manner likely to cause him suffering or injury to health (including injury to, or loss of sight of hearing, or limo or organ of the body or any mental derangement), commits the offence of cruelty to children.

(2) Whoever commits the offence of cruelty to children shall on conviction be punished with imprisonment of either description for a term not less than two years and not exceeding ten years and may also be punished with fine and be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.".

Further, the **Penal Code (Amendment) Act, no.16 of 2006** added the following Explanation for the above Section:

"*Explanation: "injuries" includes psychological or mental trauma.*".

Thus, the above demonstrated the evolving approach taken by legislators in the 20th and 21st century, progressively accepting the illegality of Corporal Punishment in 1995 and thereafter the recognition of mental trauma associated with violence in 2006. This criminalisation of Corporal Punishment is drastically different from the approach taken by the principle enaction in 1883.

The Ministry of Education has not been blind to the practice of Corporal Punishment. As the institution in charge of the education of all young minds in this country, particularly those within the public school system, the Ministry of Education has issued multiple circulars in relation to Corporal Punishment. The Circular, as mentioned in the document marked '3R1', which is **Circular number 12/2016** issued on 29.04.2016, which was to be enforced with effect from 02.05.2016 superseding the provisions of the **Circular No.17/2005** on securing discipline within the school, is the current circular in regards to Corporal Punishment within schools. This follows much of the same material available in the previous circular with the addition of provisions

on the Disciplinary Board of a school. The circular recognises that the duties and nature of responsibility borne by the teachers comes from the concept of *loco parentis* which essentially stands to mean "in the place of parents". Thus, teachers tend to recognise that they, in the place of parents, bear the responsibility to keep children safe, teach children and look to the general growth, discipline and safety of children. The circular further states that groups such as Medical Officers, Psychologists, and Humanitarians have explicated Corporal Punishments as chastisement that causes physical pain. They have further stated that it would negatively affect to the learning process of the students and their tendency to show anti-social acts would increase whilst it may improve severe distress among them and that since there is minimum evidence to confirm that student behavior in the classroom have been developed through such chastisements, it is deemed to be a useless process. The Circular in paragraph 2.2.1 lists the negative outcomes of the practice of Corporal Punishment revealed through various studies.

Importantly to the instant case, the circular states that a school must have a Board of Discipline and states the constitution of the board. Section 2.3 of the circular discusses the functions of the Disciplinary board while section 2.4 states the repercussions and possible legal redress against teachers who punish students, even when it is done so with the objective of maintaining discipline. Section 2.3.2 offers alternative methods of discipline in place of Corporal Punishment, in the instant case, all of the demonstrated methods of discipline could have been used by the 1st Respondent in place of using physical violence, particular those in subsection ii - iv given the nature of the error by the Child Petitioner, but the 1st Respondent did not attempt to resort to such non-violent methods.

Section 2.4 recognises that Corporal Punishment even when used as a method of disciplinary action may lead to legal action. The circular expressly recognises that a cause of action may arise over the infringement of Fundamental Rights in terms of the **Article 11** of **Chapter III** and **Article 126** of **Chapter XVI of the Constitution of**

the Democratic Socialist Republic of Sri Lanka, as has occurred in the instant case. Further it is stated that a course of action may arise over the offence of Cruelty to Children in terms of the **Section 3** of the **Penal Code (Amendment) Act (No. 22 of 1995)** and **Section 308A** of the **Penal Code**, as enumerated above. If it is advised by the Hon. Attorney General that legal action can be taken in that regard, having considered facts submitted at the investigation, a case can be instituted against the relevant offenders. Finally, if it is proved at the disciplinary inquiries conducted by the Authorities of the Ministry of Education over the imposition of Corporal Punishments, disciplinary actions can be taken in terms of the Establishments Code.

The current circular as discussed and circulars regarding the discipline of children preceding this circular have continually emphasized the importance of maintaining discipline within the school without inhuman physical or mental punishments and it emphasises furthermore that teachers are responsible for creating a school environment free of child abuse. Thus, given the clear guidelines of the circular which have not been adhered to and the express provision by the circular to the Petitioners to institute the present action, the 1st Respondent is clearly liable for his violations of the above circular as recognised by the Zonal Director of Education in document '3R1' as stated in Paragraph 5.1 at page 5 of the report.

The archaic attitude towards punishment of children of "spare the rod and spoil the child "prevails strongly in Sri Lankan culture, indeed the saying used is,

"නොගහා හදන ළමයයි, හැඳි නොගා හදන හොද්දයි වැඩක් නැත."

(The child raised without beating and the curry made without stirring is useless)

This view does not essentially originate from Sri Lankan culture. In Sri Lanka, there is ample evidence in relation to laws introduced by Kings in order to promote a non-violent, benevolent society, raising nurturing children. In reference to the Chulawamsa it says that during the Anuradhapura and Polonnaruwa era we had two

kings who introduced legislature explicitly stating that there should be no physical punishment on both adults and children. Therefore, our culture was such that it had a negative view on Corporal Punishment. Corporal Punishment was a prevalent method of punishment used during the colonial era of occupation brought into practice from public school practices from their respective countries, thereby trickling into the attitudes and daily practices of citizens of the country. Indeed, The **General Comment no.8 to the UNCRC** recognises that the defense of "lawful" or "reasonable" chastisement or correction has formed part of the English common law for centuries, as has a "right of correction" in French law. However, at such time, the same defense was available to justify the chastisement of wives, slaves, and servants, which clearly demonstrates that this defense is long outdated. The irony is in that these western nations recognised the detrimental nature of Corporal Punishment and have abolished such practices well before our culture started to recognise the necessity of reforming societal attitudes towards Corporal Punishment. It is indeed an outdated and disproven practice from the western world that we are dearly holding on to.

As educators, teachers hold a primary responsibility in ensuring the safety of children. As discussed above, it has been expressly clarified by the Ministry of Education that Corporal Punishment is against this fundamental responsibility. Additionally, it is the practices ingrained and experienced by children that they carry forward into adulthood. Experiencing physical violence in childhood increases the likelihood of producing adults that engage in violence in daily life and the infliction of violence upon future children as it is the "traditional" and "tried and tested" method of raising children

Corporal Punishment as a method of discipline is ineffective for multiple reasons. It is used by adults for the simple reason that physical violence is more likely to bring instant compliance. This method of correction teaches children to fear violence and normalises violence as opposed to bringing any sense of understanding

of the wrong committed or of the true societal value of discipline. The behavior is avoided in the future not due to understanding of the wrong committed but due to the trauma of violence. Encouraging corporal violence normalises violence, undermines the dignity of a child, and inflicts trauma in children which is reflected in unhealthy and disruptive behavior as adults. Corporal Punishment disregards the integrity, autonomy, and dignity of each child. The **General Comment no.8 to the UNCRC** in paragraph 47 recognises that " The Convention asserts the status of the child as an individual person and holder of human rights. The child is not a possession of parents, nor of the State, nor simply an object of concern." This further points out the aims of education and the method of providing proper guidance for children in a healthy environment. Thus, caretakers are not entitled to inflict violence upon minors in their care, as minors are beings of their own rights and not mere property under the care of the legal guardians.

We must also recognise that adults are protected by law from similar incidents as it would amount to criminal use of force, assault, and other crimes against the person. Children as minors and vulnerable members of the society, when hit, injured, traumatised in the name of discipline or punishment, must not be left defenseless and unheard when faced with such violence. Normalising violence as in the instant case is unacceptable as this leaves voiceless minors vulnerable in the face of mental and physical violence and trauma, and we, as an institution of Justice would be failing in our duty to allow for such normalisation of violence and victimisation of children.

In addition to the above act of the infliction of harm upon the Child Petitioner, a secondary aspect of the offence by the 1st Respondent is that of negligence. Section 308A as enumerated above includes negligence that causes suffering to the minor. I must observe the negligence of all the teachers concerned that were aware of this occurrence, who continued to undermine the pain of the Child Petitioner and provided no medical assistance to the Child Petitioner despite his communication to them that he was in excruciating pain. The concept of "locus parenti" as mentioned

above, meaning to be in the place of parents, imposes an obligation upon teachers to address a child's injuries and to provide assistance and care. It means the best interest of the child, as opposed to the convenience and best interest of the teachers. In this regard, the 1st Respondent and even the other teachers aware of this incident have failed their duty. The only offer made to the Child Petitioner was that of tea. His claims of being in unbearable pain was met with indifference and being told that "it will pass" and to not exaggerate and tell his parents of his pain. As the Child Petitioner saw that no assistance was forthcoming, he himself purchased painkillers from the school canteen. This entire incident, inclusive of the assault and the subsequent negligence is such that students and parents alike are likely to lose their faith and trust in the public education system, the school, those in charge as the Principal and all teachers who undertake the care of children.

Violation of Fundamental Rights (Corporal Punishment and torture)

The Petitioners apply to this court under Article 11 of the Constitution for an alleged violation of the Child Petitioner's fundamental rights, the provision which reads as follows:

> *"No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment".*

Further, in reference to minors, the **Child Rights Convention** in **Article 37** states as follows:

> *"States Parties shall ensure that:*
>
> *(a) No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. "*

In addition to the above, all notable international declarations of human rights prohibit torture as well as cruel, inhuman, or degrading treatment or punishment.

Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and **Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** contain similar terms.

It is indeed established as above, that the injury to the Child Petitioner occurred due to a punishment in the form of Corporal Punishment. In relation to Corporal Punishment and the association with the freedom from torture, cruel inhuman or degrading punishment, the Committee on the Rights of the Child notes in its concluding observations on States Parties' reports and in other comments that any Corporal Punishment of children, however light, is incompatible with the Convention on the Rights of the Child, citing, in particular, article 19, which requires protection of children "from all forms of physical or mental violence", and in relation to school discipline, Article 28(2), in addition to Article 37.

Thus, while Corporal Punishment does not amount to torture in itself in the instant case, the practice of infliction of physical or mental punishment which disregards the inherent dignity of a child amounts to inhuman or degrading punishment. However, I must clarify that the gravity of the crime would reflect on the sentence as well, and as such, extreme use of force or continual use of force in Corporal Punishment could even amount to torture if a situation warrants for it.

It is indeed established in Sri Lanka that Corporal Punishment may amount to violations of Article 11 of the Constitution. In the case of **Bandara V Wickremasinghe (1995) 2 SLR 167**, despite the case being prior to the amendments to the penal code criminalizing Corporal Punishment or recognising mental trauma in 2006, the Supreme Court supported the view that excessive use of force by teachers and administrative officials in maintaining discipline could amount to cruel and degrading treatment. In that case Kulatunga, J was of the view that:

> *"I agree that discipline of students is a matter within the purview of schoolteachers. It would follow that whenever they purport to maintain*

discipline, they act under the colour of office. If in doing so, they exceed their power, they may become liable for infringement of fundamental rights by executive or administrative action."

He was further of the view that:

"This Court must by granting appropriate relief reassure the petitioner that the humiliation inflicted on him has been removed, and his dignity is restored. That would in some way guarantee his future mental health, which is vital to his advancement in life."

I am inclined to support the view as stated above. Given the advancements of society as enumerated above, this view must be fundamentally held and developed upon. In the instant case, the court as the upper guardian of the child, must ensure that the Child Petitioner is provided with a sense of justice being restored in view of the violation of his person and the lack of respect to his dignity exhibited by the 1st Respondent. While I recognise Parents, Teachers and Guardians as being responsible for the growth and upbringing of children, they are entrusted with the duty of guiding children and instilling discipline in them. However, children are not to be considered property of the adults entrusted with their care. Children are entitled to their own sense of self and dignity being separate beings. It is unacceptable to consider that a child assaulted may not be entitled to remedy while an adult in the same circumstances would be entitled to such relief, for the reason of being a minor. In any case, minors as vulnerable and impressionable members of society must be entitled to a higher degree of protection.

In the case of **Wijesinghe Chulangani vs Waruni Bogahawatte SC FR App No. 677/2012 (Supreme Court minutes dated 12th June 2019),** violation of Article 11 was discussed by Aluwihare PC. J in relation to police custody of a minor. However, the case of **Bandara V Wickremasinghe** (*ibid*), in order to state the following:

"Nevertheless, this Court recognises that what amounts to a 'high degree of maltreatment' in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child."

Thus, with regard to the above, I am of the view that in the instant case it is imperative to the child that he is assured that his dignity is recognised by law and is thus reflected by this decision, for his healthy advancement of life and appreciation of this fundamental dignity of himself and of others.

This stance is one that is not only applicable to Sri Lanka. In the case of **Parents Forum for Meaningful Education vs Union of India and Another 89 (2001) DLT 705**, The UNCRC, the Right to be free from torture, The Right to life have been discussed extensively, among others by the Delhi High Court. In arriving at the decision that Corporal Punishment must be outlawed, the learned judge has made important observations including that fundamental rights of the child will have no meaning if they are not protected by the State and that the State and the schools are bound to recognise the right of the children not to be exposed to violence of any kind connected with education. It was stated that to allow even minimum violence to children can degenerate into aggravated form as a teacher using the rod cannot every time be mindful of the force with which he may be hitting the child. Further, that children are entitled to all the constitutional rights and that a child cannot be deprived of the same just because he is small. Being small does not make him a less human being than a grown up.

A Child is a precious national resource to be nurtured and attended with tenderness and care and not with cruelty. Subjecting the child to Corporal Punishment for reforming him cannot be part of education given that as noted above,

it causes incalculable harm to him, in his body and mind. The learned judge accurately describes this phenomenon as follows:

> *"The child has to be prepared for responsible life in a free society in the spirit of understanding, peace, and tolerance. Use of Corporal Punishment is antithetic to these values. We cannot subject the child to torture and still expect him to act with understanding, peace and tolerance towards others and be a protagonist of peace and love. It was probably for this reason Mahatma Gandhi said that "if we are to reach real peace in this world, and if we are to carry on a real war against war, we shall have to begin with children, And if they will grow up in their natural innocence, we won't have to struggle, we won't have to pass fruitless idle resolutions, but we shall go from love to love and peace to peace, until at last all the corners of the world are covered with that peace and love for which, consciously or unconsciously, the whole world is hungering."* "

I must also importantly note that the Petitioners further prefer this application under Article 17 of the Constitution which states that:

> *"Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter"*

It is established through the case of **Bandara V Wickremasinghe** *(supra)*, that teachers in the act of maintaining discipline, act in the colour of their office and not in their personal capacity and that if they so exceed their powers while in this pursuit, they may become liable for infringement of fundamental rights by executive or administrative action (as quoted and discussed above). For this reason, I am of the view that in the instant application, the 1st Respondent was acting in his official capacity and that for this reason, the incident was a violation of the fundamental right

of the Child Petitioner as guaranteed by Article 11 of the Constitution, by an executive or administrative action.

Additionally, in the instant case, I must also note that the 1st Respondent states in his affidavit that the 1st Respondent did not know any details of the Child Petitioner, and bore no personal grudge against the Child Petitioner prior to this incident and thus that there was never any malicious intent on his part. However, there is no requirement of malice or intent required for the violation of Article 11 or Article 17 of the Constitution. Further, it is established through the circulars by the Education Ministry, in circular 12/2016 paragraph 2.4, that even with the best interest of the child and the discipline of the school in mind, a teacher may be in violation of all relevant provisions in reference to Corporal Punishment. Thus, the intention of the perpetrator is irrelevant to the illegality of Corporal Punishment, be it a teacher, parent, guardian or any other adult under who's care or contact that the minor may be in, for the sole reason that it is the duty of the State to protect children from all forms of physical violence.

Finally, I must also recognise that the elimination of the practice of Corporal Punishment may not be achieved through isolated incidents, but a profound understanding by those entrusted with the care of children that violence is not a justifiable means to the end of discipline. Cruelty, violence, physical harm, particularly in the view of setting an example is condemned by all major faiths of our country, which forms the bedrock of our culture. The Dhammapada, profoundly states as follows:

"Attānañce tathā kayirā,

yathaññam-anusāsati,

sudanto vata dametha,

attā hi kira duddamo."

(As one instructs others, so should one act; if one would tame others, one should first be well tamed. Truly, it is very hard to tame oneself).

It is thus clear, that those guiding and instructing impressionable children, do not set a suitable example in impulsively engaging in violent acts that harm children in the name of disciplining them, as children are only likely to carry forward this behavior. If teachers aim to instill self-discipline and non-violence in children, they must set the example by instilling the same values in themselves. While this is difficult practice, if one is to expect this of children, they are to reflect it and expect it of themselves.

It is imperative that we do not, as a State, condone behavior as in the instant case as it is detrimental to the growth of a child and is to be construed as cruel or degrading treatment. For this reason, I find that the actions by the Zonal Director of Education as stated in the document marked '3R1', which was to remove the 1st Respondent from the Disciplinary Board of the school in addition to advising him to never repeat such conduct in the future, as insufficient, taking into consideration the violation in question, as well as the permanent damage caused to the Child Petitioner by the 1st Respondent in the instant case.

Decision

Considering the Petition, Affidavit and Written Submission of the Petitioners and the Respondent as well as the submissions made by the Counsel, I find that the Fundamental Rights of the Child Petitioner enshrined in Article 11 of the Constitution have been violated by the 1st Respondent and the State. After careful examination of all facts and relevant matters, especially a permanent lifelong damage to the Child Petitioner's hearing ability, I order compensation of One Hundred and Fifty Thousand Rupees from the 1st Respondent to the Child Petitioner and a further sum of Five

Hundred Thousand Rupees by the State to be paid to the Child Petitioner. The aforementioned sum is to be paid within 6 months from the date of this judgement.

Application allowed.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J.

I agree**.**

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT